Supreme Court, U. S.
FILED
MAR 1 1977
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1976

No. 76-789

BARON EUGENE NOLL,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

ANTHONY F. TROY
Attorney General of Virginia

JERRY P. SLONAKER
Assistant Attorney General

Supreme Court–State Library Building
Richmond, Virginia 23219

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

OPINION BELOW 1

JURISDICTION 1

QUESTIONS PRESENTED 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

ARGUMENT

I. The Evidence Was Sufficient To Support The Judgments Of The Trial Court Convicting Petitioner Of Four Separate Charges Of Attempted Murder Of The Occupants Of A Dwelling House, Which Charges Arose From The Firebombing Of That House. 2

II. The Evidence Was Sufficient To Sustain Petitioner's Conviction Of Possession Of A Sawed-Off Shotgun Under Circumtances Indicating Preparation For The Commission Of A Crime Of Violence. 5

III. The Evidence Was Sufficient To Sustain The Convictions Of Possession Of Marijuana And LSD, And, In This Context, The Supreme Court Of Virginia Followed Its Own Decisions And Applied The Doctrine Of *Stare Decisis*. 8

CONCLUSION 11

CERTIFICATE OF SERVICE 12

TABLE OF CITATIONS

Cases	Page
Avent v. Commonwealth, 209 Va. 474, 164 S.E.2d 655 (1968)	11
Banovitch v. Commonwealth, 196 Va. 210, 83 S.E.2d 369 (1954)	3
Carter v. Commonwealth, 212 Va. 665, 187 S.E.2d 203 (1972)	7
Chittum v. Commonwealth, 211 Va. 12, 174 S.E.2d 779 (1970)	4
Epps v. Commonwealth, 216 Va. 150, 216 S.E.2d 64 (1975)	4
Ford v. Commonwealth, 215 Va. 308, 208 S.E.2d 921 (1974)	8
Grayson v. Harris, 267 U.S. 352, 69 L.Ed. 652, 45 S.Ct. 317 (1925)	3
Huvar v. Commonwealth, 212 Va. 667, 187 S.E.2d 177 (1972)	9
Merritt v. Commonwealth, 164 Va. 653, 180 S.E. 395 (1935)	3
People v. Neal, 98 Cal.App.2d 668, 218 P.2d 556 (1950)	5
Ritter v. Commonwealth, 210 Va. 732, 173 S.E.2d 799 (1970)	9
Thayer v. Spratt, 189 U.S. 346, 47 L.Ed. 845, 23 S.Ct. 576 (1903)	3
Williams v. Commonwealth, 212 Va. 818, 188 S.E.2d 79 (1972)	10, 11

Statutes

§ 18.1-268.3, Code of Virginia (1950), as amended	6
§ 18.1-268.4, Code of Virginia (1950), as amended	6, 7

In The

Supreme Court of the United States

October Term, 1976

No. 76-789

BARON EUGENE NOLL,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF OF RESPONDENT IN OPPOSITION TO GRANTING OF WRIT OF CERTIORARI

PRELIMINARY STATEMENT

The respondent, Commonwealth of Virginia, respectfully prays that a Writ of Certiorari to the judgment of the Supreme Court of Virginia entered in this case on September 13, 1976, refusing a Writ of Error and Supersedeas, not be granted.

OPINION BELOW

The judgment of the Supreme Court of Virginia is not reported as it was a refusal of the writ of error and supersedeas without opinion and it is contained in the Appendix to the Petition for a Writ of Certiorari as Appendix A.

JURISDICTION

Petitioner asserts that the jurisdiction of this Court to issue the writ of certiorari is grounded upon 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient on the element of specific intent to sustain four convictions for attempted murder of the occupants of a firebombed dwelling house.

2. Whether the evidence was sufficient to sustain the conviction of possession of a sawed-off shotgun "under circumstances indicating . . . preparation for the commission of a crime of violence."

3. Whether the evidence was sufficient to sustain the convictions for possession of drugs, and, in this context, did the Supreme Court of Virginia refuse to follow its own decisions and to apply the doctrine of *stare decisis* and thereby deny petitioner due process and equal protection of the law.

STATUTES INVOLVED

The relevant constitutional and statutory provisions are set forth in full in the Petition for a Writ of Certiorari at pages 2 through 5.

STATEMENT OF THE CASE

Petitioner's statement of the case and statement of facts are substantially correct and are hereby adopted.

ARGUMENT

I.

The Evidence Was Sufficient To Support The Judgments Of The Trial Court Convicting Petitioner Of Four Separate Charges Of Attempted Murder Of The Occupants Of A Dwelling House, Which Charges Arose From The Firebombing Of That House.

The petitioner's argument constitutes an attack on the sufficiency of the evidence which does not rise to the level

of a constitutional question before this Honorable Court. *Thayer* v. *Spratt*, 189 U.S. 346, 47 L.Ed. 845, 23 S.Ct. 576 (1903); *Grayson* v. *Harris*, 267 U.S. 352, 69 L.Ed. 652, 45 S.Ct. 317 (1925). Petitioner is attempting to convert this assignment of error into a Federal question by asserting that the convictions for attempted murder are devoid of evidentiary support for the element of specific intent to kill the four occupants of the dwelling.

The Commonwealth submits that there was ample evidence to support the finding of requisite specific intent, which "may, like any other fact, be shown by circumstances. Intent is a state of mind which can be evidenced by the words or conduct of the person who is claimed to have entertained it." *Banovitch* v. *Commonwealth*, 196 Va. 210, 216, 83 S.E.2d 369, 373 (1954); See also *Merritt* v. *Commonwealth*, 164 Va. 653, 180 S.E. 395 (1935).

The record reveals that the petitioner believed that he had been "ripped off" by one Evelyn Pierce, and he wanted to get even with her. (Tr. at 26, 106-107, 146). The petitioner solicited the aid of several friends to make firebombs and to bomb the home of Evelyn Pierce. (Tr. at 107-108). Prior to preparing the firebombs, the petitioner and an accomplice walked by the house to determine which windows were to be targets for the firebombs. (Tr. at 111). *Three* bombs were subsequently prepared, and petitioner instructed his accomplices to toss them into the home at *three different locations*. One firebomb was to be hurled through the front window, another into a side window, and a third was to be thrown into the middle of the one-story house. (Tr. at 23, 25, 67, 111). On signal from petitioner, the bombs were ignited and thrown.

Evelyn Pierce's stepfather, George Foeller, was awakened by his wife's screams and he immediately saw "sparks around

the bedroom" and a small shag carpet on fire. As he carried the burning carpet out of the house, he observed the living room "completely ablaze" and yelled for the family "to get out of the house." (Tr. at 80). As a result of the fire, Mr. Foeller's four-year-old son suffered burns on his face and both arms and his wife was "burned severely—arms, hands, feet, shoulders, completely over her face." (Tr. at 89). Mr. Foeller and a stepson who was also in the residence managed to escape uninjured, but the fire left the living room "totally burned out" and there was "heavy burn damage throughout the entire building." (Tr. at 92). The firebomb thrown into the north bedroom failed to explode and "smothered out," leaving only slight scorching. There were, however, three separate fires in the home. (Tr. at 95).

The record also reflects that after the attack on the home had been completed, petitioner said that he hoped the girl [Evelyn Pierce] was home (Tr. at 37) and he asked, "Did they [the firebombs] all go in the house?" (Tr. at 115).

Notwithstanding the after-the-fact disclaimers by the perpetrators of any actual intent to kill anyone and their assertions that they had only intended to "scare" Miss Pierce, their heinous acts speak louder than their self-serving and after-the-fact declarations.

Specific intent can be inferred from the totality of the circumstances and the conduct of the parties. *Chittum* v. *Commonwealth,* 211 Va. 12, 174 S.E.2d 779 (1970); *Epps* v. *Commonwealth,* 216 Va. 150, 216 S.E.2d 64 (1975). It is abundantly clear how the trial judge, who sat as trier of fact without a jury, could have and did find specific intent to kill from the nighttime multiple firebombing of the one-story single dwelling, which acts were motivated by a desire for revenge.

The petitioner also argues in his petition for a writ of certiorari that while the "single act of arson" may be sufficient to support one conviction of attempted murder, "it is certainly not sufficient to support convictions for attempted murder of each and every occupant" of the house. (See Petition at 16). The Commonwealth submits that not only was specific intent to kill *all* occupants demonstrated by the multiple firebombing of the small, single family dwelling house from different angles, which would be reasonably designed and calculated to totally engulf the home in flames, but the doctrine of transferred intent would extend petitioner's specific intent to kill Evelyn Pierce to include other members of the home present at the time of the firebombing.

In *People* v. *Neal,* 98 Cal. App.2d 668, 218 P.2d 556 (1950), a defendant was convicted for attempted murder of a husband and wife, by igniting gasoline in their bedroom, although his specific intent was to kill the husband only. The court employed the theory of transferred intent to convict the defendant of attempted murder of the wife. In the instant case, petitioner's firebombing of the entire house is certainly sufficient to transfer his specific intent to murder Evelyn Pierce to include other members of the household.

II.

The Evidence Was Sufficient To Sustain Petitioner's Conviction Of Possession Of A Sawed-Off Shotgun Under Circumstances Indicating Preparation For The Commission Of A Crime Of Violence.

Petitioner again challenges sufficiency of the evidence to sustain conviction, and in this instance he asserts that the evidence was insufficient on the charge of possession of a sawed-off shotgun under circumstances indicating prepara-

tion for the commission of a crime of violence. The Virginia statutes on which the Commonwealth prosecuted the petitioner were §§ 18.1-268.3 and 18.1-268.4, Code of Virginia (1950), as amended. (Reproduced in Petition at 4-5). Paragraph four of the latter section provides that possession of a sawed-off shotgun shall be presumed to be for an offensive or aggressive purpose if the gun is found in the defendant's possession and the circumstances indicate his preparation for the commission of a crime of violence.

The record shows that the petitioner brought a sawed-off shotgun with him on the night that the house was firebombed. Accomplice Darrell B. Phinney, who testified for the Commonwealth, identified the gun seized by the police as the one which petitioner had in his possession during the firebombing. After identifying the particular gun, Phinney testified that "Mr. Noll [petitioner] brought it along in the car *that night to the firebombing when we went.* And *when he . . . come* (sic) *back home he hid that* and the marijuana and the LSD he had in pills next door to his apartment, some storage shed . . . ." (Tr. at 118). (Emphasis added). Phinney later stated unequivocally that he personally saw petitioner put the shotgun in the car and that the petitioner himself informed him that he [petitioner] hid the gun "after he got back to the house." (Tr. at 120). Upon information from Phinney and another accomplice, the police discovered the shotgun five days after the arson in a storage room adjacent to petitioner's apartment. (Tr. at 169, 172).

The Commonwealth proved, as required by the statute, that petitioner was in possession of an illegal sawed-off shotgun while preparing for and during the commission of the firebombing, a crime of violence. The reasonable inference to be drawn from the petitioner's carrying of such a weapon in the time frame indicated (loading it in the car just

prior to the firebombing raid and promptly removing it from the car and hiding it following the raid) is that he planned to use it, if necessary, during the attack.

While the Commonwealth recognizes the well established rule that criminal statutes must be strictly construed, the question becomes one of semantics when attempting to discern the legislative intent under § 18.1-268.4, Code of Virginia (1950), as amended. Does the phrase "found in the possession of the individual" mean that the police must apprehend an individual with the gun in his possession at that moment and prior to the violent offense, as petitioner appears to argue, or does this phrase mean that the Commonwealth need only establish that the gun was in the accused's possession while he was preparing or committing the crime of violence? The Commonwealth submits that it is clearly the latter.

In *Carter* v. *Commonwealth*, 212 Va. 665, 187 S.E.2d 203 (1972), the Supreme Court of Virginia reversed and remanded the judgment of the trial court convicting a defendant, one Dwight Carter, of possession of a sawed-off shotgun for an offensive or aggressive purpose. In that case two men had appeared at the front of an apartment building, and one of these men (identified as the accused, Carter) was observed by a woman in the lobby to have a "pipe-like object." As the woman ran from the scene, she heard a shot. About eight days later, police officers found a sawed-off shotgun wrapped in plastic and buried under a stairway in the open yard to the rear of the residence of Carter's stepgrandfather. Hearsay evidence indicated that Carter resided there, but all direct evidence was to the contrary. Carter was not present when the gun was found, and the evidence did not reveal when he had last been there. The witness who had observed Carter with the "pipe-like object" neither

identified the shotgun as the "pipe-like object" nor was she even asked whether the shotgun resembled the "pipe-like object." The Court overturned the conviction because the evidence did not connect Carter with the shotgun buried in the rear of the residence and did not show that Carter possessed a shotgun *when he was seen at the front of the apartment building*—not because the shotgun was "found" buried rather than at that instant in the possession of Carter as he was preparing for the commission of a crime of violence in the future.

Similarly, in *Ford* v. *Commonwealth*, 215 Va. 308, 208 S.E.2d (1974), the Supreme Court of Virginia reversed a conviction for possession of a sawed-off shotgun as the circumstances did not indicate that the defendant was preparing to participate in a violent crime. The Court indicated that although the defendant was only seen with the weapon in his possession and was not arrested with it in his possession, it would have upheld the lower court's verdict if it had appeared from the circumstances that the defendant was preparing to engage in a crime of violence. Actual possession at the point of arrest is not necessary, but proof of possession at the time of preparation or commission of the violent offense is the requisite. In the case at bar, the Commonwealth provided such proof.

III.

The Evidence Was Sufficient To Sustain The Convictions Of Possession Of Marijuana And LSD, And, In This Context, The Supreme Court Of Virginia Followed Its Own Decisions And Applied The Doctrine Of Stare Decisis.

Petitioner once again attempts to elevate a challenge to sufficiency of the evidence to an issue of constitutional magnitude, this time by arguing that petitioner has been denied

due process and equal protection because the Virginia Supreme Court allegedly did not follow its own decisions and ignored the doctrine of *stare decisis* when it affirmed his convictions for possession of marijuana and LSD.

Petitioner cites *Ritter* v. *Commonwealth*, 210 Va. 732, 173 S.E.2d 799 (1970), for various points of Virginia law, including that (1) it is generally necessary to show that an accused was aware of the presence and character of the particular controlled substance and was intentionally and consciously in possession of it, (2) possession need not always be exclusive but may be shared with one or more other persons, (3) duration of the possession is immaterial and possession need not always be actual possession, and (4) the accused may be shown to have had constructive possession by establishing that the drugs involved were subject to his dominion or control. Petitioner then cites *Huvar* v. *Commonwealth*, 212 Va. 667, 187 S.E.2d 177 (1972), for the proposition that mere presence of an individual, who was present along with other persons, at a location where illegal drugs or narcotics were found, was not sufficient to convict him of actual or constructive possession of the drugs found there. In *Huvar*, the accused "made no statement, committed no act and indulged in no conduct from which the inference could be fairly drawn that he possessed or controlled the drugs which the police found." 212 Va. 667, 668, 187 S.E.2d 177, 179.

The Commonwealth certainly has no quarrel with the aforesaid points of Virginia law, and the Supreme Court of Virginia did not refuse to apply any of those evidentiary principles which were pertinent to the instant case. The record reveals that witness Phinney saw the petitioner in possession of marijuana and LSD, along with the sawed-off shotgun, on the night that the firebombing occurred. (Tr.

at 118). Also, while Phinney was in jail with the petitioner, following their arrest for the firebombing, he was told by the petitioner that he [petitioner] had hidden these drugs in a storeroom adjacent to petitioner's apartment. (Tr. at 120). In addition to this evidence, it was established that in the bag containing the marijuana and LSD, which was found by police in the storeroom, there was a cold cream jar containing a quarter ounce of marijuana. The petitioner's fingerprint was found on this jar. (Tr. at 193-194). The Commonwealth established that the petitioner had hidden the drugs in the storeroom where they were found by the police, and only the petitioner's accomplices, who were in jail, were aware that the drugs were in the storeroom. The record reveals that only William Martin, the owner of the apartments and storeroom, had regular access to this room, and he was not aware that the drugs had been hidden there. (Tr. at 174, 182, 185).

Petitioner virtually ignores the evidence of the admissions and statements of the petitioner regarding the marijuana and LSD, and he asserts that "there was no evidence introduced at trial which would establish that Noll [petitioner] ever had exclusive or actual possession of the narcotics." (Petition at 25). Petitioner focuses his attention on the fingerprint evidence and quotes some language from *Williams* v. *Commonwealth*, 212 Va. 818, 188 S.E.2d 79 (1972), out of its factual context. In *Williams* the *only* evidence linking the accused to the crime of breaking and entering an appliance store consisted of his fingerprints found on a television set stolen from the showroom of the store on the night of the crime. The accused testified that one or two days before the crime was committed, he had gone into the store during business hours because he was interested in buying a television set and at that time he

touched a number of sets. The proprietor of the store thought that he had seen the accused in his store at some indeterminate time before the crime was committed. In the *Williams* decision, the Supreme Court of Virginia observed that in *Avent* v. *Commonwealth,* 209 Va. 474, 164 S.E.2d 655 (1968), it held the defendant's fingerprints sufficient to support a conviction of burglary of a storeroom, but the Court noted that in *Avent* the prints were found on a window of the storeroom that was not readily accessible to the public and at a place where the defendant had no legitimate reason to be—facts which the *Avent* opinion emphasized.

The case at bar is patently distinguishable from the situation in *Williams* where the *only* evidence was the fingerprints found on the television set that had been on display in the store's public showroom. The Commonwealth submits that the Supreme Court of Virginia did not fail to apply its own decisions, and there clearly was no denial of due process or equal protection of the law.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ANTHONY F. TROY
Attorney General of Virginia

JERRY P. SLONAKER
Assistant Attorney General

Supreme Court–State Library Building
Richmond, Virginia 23219

CERTIFICATE OF SERVICE

I, Jerry P. Slonaker, Assistant Attorney General of Virginia, counsel for the respondent in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 1st day of March, 1977, I mailed three copies of the foregoing brief for the respondent in opposition to the granting of a writ of certiorari to Stanley E. Sacks, Esquire, Sacks, Sacks & Tavass, First and Merchants National Bank Building, Norfolk, Virginia 23510, counsel of record for petitioner.

JERRY P. SLONAKER
Assistant Attorney General